



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2012-0798; FRL-9914-79-OAR]

Approval and Promulgation of Implementation Plans; Mississippi:

New Source Review (NSR)-Prevention of Significant Deterioration (PSD)

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve portions of a revision to the Mississippi State Implementation Plan (SIP) submitted by the State of Mississippi, through the Mississippi Department of Environmental Quality (MDEQ), on February 10, 2012. The SIP revision modifies Mississippi's New Source Review (NSR) Prevention of Significant Deterioration (PSD) program to incorporate by reference (IBR) certain Federal PSD regulations. EPA is proposing to approve these portions of Mississippi's SIP revision because the Agency has preliminarily determined that they are consistent with the Clean Air Act (CAA or Act) and EPA's NSR permitting regulations.

DATES: Comments must be received on or before [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2012-0798 by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.
2. E-mail: R4-RDS@epa.gov.
3. Fax: (404) 562-9019.
4. Mail: EPA-R04-OAR-2012-0798, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
5. Hand Delivery or Courier: Ms. Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. "EPA-R04-OAR-2012-0798." EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through www.regulations.gov or e-mail, information that you consider to be CBI or otherwise protected. The www.regulations.gov website is an "anonymous access" system, which means

EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your

inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Mississippi SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Ms. Bradley's telephone number is (404) 562-9352; e-mail address: bradley.twunjala@epa.gov.

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I. What Action is EPA Proposing?

On February 10, 2012, MDEQ submitted a SIP revision to EPA for approval into the Mississippi SIP that includes changes to the State's Air Quality Regulations in Air Pollution Control, Section 5 (APC-S-5) - *Regulations for the Prevention of Significant Deterioration of Air Quality*. These rule changes were provided to comply with Federal NSR PSD permitting

requirements. The February 10, 2012, SIP submission updates the IBR¹ date in APC-S-5 to November 4, 2011, for the Federal PSD permitting regulations at 40 CFR 52.21 and portions of 51.166 to include PSD provisions promulgated in the carbon dioxide (CO₂) Biomass Deferral Rule,² PM₁₀ Surrogate and Grandfather Policy Repeal,³ and Reasonable Possibility Rule.⁴ EPA is not proposing to approve the portion of Mississippi's SIP submission that IBR the July 20, 2011 CO₂ Biomass Deferral Rule because the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a decision on July 12, 2013, in *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013) to vacate the rule. Today, EPA is proposing to approve only the portions of Mississippi's February 10, 2012, SIP revision addressing the Reasonable Possibility Rule and the PM₁₀ Surrogate and Grandfather Policy Repeal Rule.⁵

II. What is the Background for EPA's Proposed Action?

¹ Throughout this rulemaking the acronym IBR means "incorporate by reference" or "incorporates by reference."

² "Deferral for CO₂ Emissions From Bioenergy and Other Biogenic Sources Under the Prevention of Significant Deterioration (PSD) and Title V Programs," Final Rule, 76 FR 43490, (July 20, 2011) (hereinafter referred to as the CO₂ Biomass Deferral Rule)

³ Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM_{2.5}); Final Rule to Repeal Grandfather Provision" Final Rule, 76 FR 28646, (May 18, 2011) (hereinafter referred to as the PM₁₀ Surrogate and Grandfather Policy Repeal)

⁴ "Prevention of Significant Deterioration and Nonattainment New Source Review: Reasonable Possibility in Recordkeeping" Final Rule, 72 FR 72607, (December 21, 2007) (hereinafter referred to as the Reasonable Possibility Rule).

⁵ Mississippi's February 10, 2012, SIP submission only addresses the adoption of the three PSD permitting regulations discussed above that the State requested for inclusion into the SIP. Any previous SIP revisions submitted by MDEQ that adopted other PSD permitting provisions captured in 40 CFR 52.21 as of November 4, 2011, were addressed by EPA in separate actions and are not relevant to the State's February 10, 2012, submission or to today's proposed approval into the SIP of the Reasonable Possibility Rule and the PM₁₀ Surrogate and Grandfather Policy Repeal Rule PSD permitting provisions discussed in this rulemaking.

Today's proposed action to revise the Mississippi SIP relates to PSD provisions promulgated in the PM₁₀ Surrogate and Grandfather Policy Repeal and the Reasonable Possibility Rule. More details regarding these rules are found in the respective final rulemakings and are summarized below.

A. Reasonable Possibility Rule

On June 24, 2005, the D.C. Circuit issued a decision on the challenges to the 2002 NSR Reform Rules including reasonable possibility. *New York v. U.S. EPA*, 413 F.3d 3 (D.C. Cir. 2005).⁶ For additional information on the 2002 NSR Reform Rules, see 67 FR 80186 (December 31, 2002) and <http://www.epa.gov/nsr>.

In summary, the D.C. Circuit remanded a portion of the rules regarding recordkeeping and the term “reasonable possibility” found in 40 CFR 52.21(r)(6) and 40 CFR 51.165(a)(6) and 51.166(r)(6) requiring that EPA either provide an acceptable explanation for its “reasonable possibility” standard or devise an appropriate alternative. In response to the court’s decision, EPA took final action on December 21, 2007, to clarify that a “reasonable possibility” applies where source emissions equal or exceed 50 percent of the CAA NSR significance levels for any

⁶ On December 31, 2002 (67 FR 80186), EPA published final rule changes to 40 CFR parts 51 and 52 regarding the CAA’s PSD and nonattainment new source review programs. On November 7, 2003 (68 FR 63021), EPA published a notice of final action on the reconsideration of the December 31, 2002, final rule changes. The December 31, 2002, and the November 7, 2003, final actions are collectively referred to as the “2002 NSR Reform Rules.” After the 2002 NSR Reform Rules were finalized and effective (March 3, 2003), industry, state, and environmental petitioners challenged numerous aspects of the 2002 NSR Reform Rules, along with portions of EPA’s 1980 NSR Rules, 45 FR 52676 (August 7, 1980). In summary, the D.C. Circuit vacated portions of the rules pertaining to clean units and PCPs, remanded a portion of the rules regarding recordkeeping and the term “reasonable possibility” found in 40 CFR 52.21(r)(6) and 40 CFR 51.165(a)(6) and 51.166(r)(6), and either upheld or did not comment on the other provisions included as part of the 2002 NSR Reform Rules. On June 13, 2007 (72 FR 32526), EPA took final action to revise the 2002 NSR Reform Rules to remove from Federal law all provisions pertaining to clean units and the PCPs exemption that were vacated by the D.C. Circuit.

pollutant. *See* 72 FR 72607. The “reasonable possibility” provision identifies for sources and reviewing authorities the circumstances under which a major stationary source undergoing a modification that does not trigger major NSR must keep records. EPA’s December 21, 2007, final rule on the record-keeping and reporting provisions also explains state obligations with regard to the reasonable possibility related rule changes.⁷ *See* 72 FR 72607 at 72613-14. The final rule gave states and local permitting authorities three years from publication to submit revisions to incorporate the reasonable possibility provisions or to submit notice to EPA that their regulations fulfill these requirements.

MDEQ adopted the NSR Reform rules in the SIP on July 28, 2005, however, MDEQ did not incorporate the “reasonable possibility” provision at that time due to the remand. In its 2005 PSD regulations at APC-S-5 (2.6), MDEQ excluded the following phrase from its IBR of 40 CFR 52.21: “in circumstances where there is a reasonable possibility, within the meaning of paragraph (r)(6)(vi) of 40 CFR 52.21, that a project that is not a part of a major modification may result in a significant emissions increase.” On July 10, 2006, EPA published the final rulemaking approving Mississippi’s SIP revision adopting the NSR Reform Rule. *See* 71 FR 38773. In the approval, EPA acknowledged Mississippi’s rule did not contain the reasonable possibility language that was included in the remand and stated, “EPA continues to move

⁷ On January 14, 2009, EPA denied a petition by the State of New Jersey (submitted February 15, 2008) for reconsideration and stay of the December 21, 2007, final rule for “reasonable possibility.” However, on March 11, 2009, New Jersey reiterated its request for reconsideration, which EPA granted on April 24, 2009. EPA has not taken action on the reconsideration; therefore, the current recordkeeping rules established in the December 21, 2007, final rule are approvable. *See* <http://www.epa.gov/nsr/actions.html#2009> under *Denial of Petitions to Reconsider Aspects of the PM_{2.5} NSR Requirements and Reasonable Possibility Rule* for additional information on the New Jersey petition.

forward with its evaluation of the portion of its NSR reform rules that were remanded by the D.C. Circuit and is preparing to respond to the D.C. Circuit's remand. EPA's final decision with regard to the remand may require EPA to take further action on this portion of Mississippi's rules."

B. PM₁₀ Surrogate and Grandfather Policy Repeal

In the NSR PM_{2.5} Rule,⁸ EPA finalized regulations to establish the framework for implementing preconstruction permit review for the PM_{2.5} NAAQS in both attainment and nonattainment areas. This rule included a grandfather provision that allowed PSD applicants that submitted their complete permit application prior to the July 15, 2008, effective date of the NSR PM_{2.5} Rule to continue to rely on the 1997 PM₁₀ Surrogate Policy rather than amend their application to demonstrate compliance directly with the new PM_{2.5} requirements. *See* 73 FR 28321. On May 12, 2011, Mississippi submitted a SIP revision that excluded the PM₁₀ surrogate grandfathering provision at 40 CFR 52.21(i)(1)(xi) from the state's PSD regulations. EPA approved portions of Mississippi's May 12, 2011, SIP revision on September 26, 2012 (77 FR 59095). On May 18, 2011, EPA took final action to repeal the PM_{2.5} grandfathering provision at 40 CFR 52.21(i)(1)(xi). *See* 76 FR 28646.

⁸ This rulemaking established regulations to implement the NSR program for the PM_{2.5} NAAQS on May 16, 2008. *See* 73 FR 28321. As a result of EPA's final NSR PM_{2.5} Rule, states were required to submit SIP revisions to EPA no later than May 16, 2011, to address these requirements for both the PSD and NNSR programs. On May 12, 2011, Mississippi submitted a SIP revision to IBR the NSR PM_{2.5} Rule into the state's SIP at APC-S-5. EPA approved portions of the NSR PM_{2.5} rule into the Mississippi SIP PSD program on September 26, 2012. *See* 77 FR 59095.

III. What is EPA's Analysis of Mississippi's SIP Revision?

MDEQ's PSD preconstruction rules are found at Mississippi Rule APC-S-5-*Regulations for Prevention of Significant Deterioration for Air Quality* and apply to major stationary sources or modifications constructed in areas designated attainment areas or unclassifiable/attainment areas as required under part C of title I of the CAA with respect to the NAAQS. MDEQ's February 10, 2012, SIP submittal updates the IBR date in APC-S-5 to November 4, 2011, for the Federal PSD permitting regulations at 40 CFR 52.21 to include the Federal PSD permitting updates promulgated in the CO₂ Biomass Deferral Rule, the Reasonable Possibility Rule, and the PM₁₀ Surrogate and Grandfather Policy Repeal. EPA is proposing to approve the updates only as they relate to the Reasonable Possibility Rule and the PM₁₀ Surrogate and Grandfather Policy Repeal. EPA is not proposing to approve the portion of Mississippi's February 10, 2012, SIP submission that IBR the CO₂ Biomass Deferral Rule at APC-S-5 as a result of the July 12, 2013, court decision identified above. EPA may address this portion of Mississippi's SIP submission in a separate rulemaking.

Regarding reasonable possibility, the February 10, 2012, SIP revision removes the reasonable possibility exclusion at APC-S-5(2.6) and IBR EPA's December 21, 2007, revised definition of reasonable possibility into its SIP.

Mississippi's February 10, 2012, SIP revision also adopts the repeal of the PM_{2.5} Grandfathering Provision. Mississippi's February 10, 2012, SIP submittal incorporates into the Mississippi SIP the version of 40 CFR 52.21 as of November 4, 2011, which includes the May 18, 2011, repeal of the grandfather provision. Thus, the language previously approved into

Mississippi SIP at APC-S-5(2.7) that excludes the grandfathering provision is no longer necessary. Mississippi's February 10, 2012, SIP submittal removes the unnecessary language pertaining to the grandfather provision from APC-S-5.

IV. Proposed Action

EPA is proposing to approve portions of Mississippi's February 10, 2012, SIP submission that update the IBR date in APC-S-5 to November 4, 2011, for the Federal PSD permitting regulations at 40 CFR 52.21 to include the Reasonable Possibility Rule and the PM₁₀ Surrogate and Grandfather Policy Repeal. EPA has made the preliminary determination that these portions of the SIP revision are approvable because they are consistent with section 110 of the CAA and EPA PSD permitting regulations.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have tribal implications as specified by Executive

Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: July 28, 2014.

Heather McTeer Toney,

Regional Administrator,

Region 4.

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